**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR**

**FRIDAY, THE 17TH AUGUST 2007 / 26TH SRAVANA 1929**

**AS.No. 666 of 1994()**
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**OS.121/1992 of PRINCIPAL SUB COURT,KOLLAM**
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**APPELLANT - DEFENDANT NO.2 :**
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**JAGADAMMA PADMAKUMARI,**
**JAGADA VILASATHU, KIZHAKKE**
**KARA MURI, KOTTARAKKARA.**

**BY ADV. SRI.CHACKO GEORGE, A.T.ANTONY**

**RESPONDENT - PLAINTIFF :**
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**P. KUTTAPPAJ, SWAPNALAYAM,**
**KOTTAKKAKAM, KOLLAM.**

**BY ADV. SRI.P.G.PARAMESWARA PANICKER**
**SRI.SHAHUL HAMEED MOOPAN, H.RAMANAN**

**THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 17/08/2007, ALONG WITH AS NO. 758 OF 1994 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

# K. PADMANABHAN NAIR, J.

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**A.S. NO. 666 OF 1994**
**AND**
**A.S. NO. 758 OF 1994**

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**Dated this the 17th day of August, 2007**

## J U D G M E N T

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**Appeal Suit No.666 of 1994 is filed by the second defendant in O.S. No.121 of 1992 on the file of the Prl. Sub Court, Kollam. A.S. No.758 of 1994 is filed by the plaintiff in the above stated suit. For the sake of convenience parties will be referred to as arrayed in the plaint.**

**2. The suit was for realisation of money. Defendants, are husband and wife. The following are the material averments. First defendant was an employee of Kundara Ceramics. He married the second defendant about 5 years prior to the date of filing of the suit. The mother-in-law of the plaintiff was residing very near to the house of the defendants. Defendants were residing together but at the time of filing of the suit, second defendant was residing at her parental house at Kottarakkara. Defendants and the wife of the plaintiff were close friends and after the marriage of plaintiff he also became a friend of the defendants.**

**Defendants wanted financial help from the plaintiff for the purpose of construction of a building in the property of the second defendant at Kottarakkara and promised to return the money after the completion of construction of the building. Plaintiff advanced a sum of Rs.15,000/- on 2.5.1989, Rs.10,000/- on 26.5.1989 and Rs.14,500/- on 21.6.1989. Defendants agreed to repay the amount advanced with 12% interest. Second defendant acknowledged receipt of the amount in her own handwriting while they received the money. First defendant issued two cheques for Rs.7,500/- each. One cheque was dated 1.3.1991 and the other cheque was dated 1.6.1991. Those cheques were encashed and first loan amount was wiped off. Defendants did not repay the balance amount in spite of demand. Hence the suit for recovery of money.**

**3. First defendant filed a written statement denying the entire averments in the plaint. He did not borrow any amount from the plaintiff and there was no transaction between himself and plaintiff. He was not an employee of Kundara Ceramics, but he was an employee of ALIND, Kundara.**

The fact that he was residing near to the house of the mother-in-law of plaintiff was admitted. The second defendant was conducting a typewriting institute as a side business and wife of the plaintiff was working in that institute as an Instructor. Second defendant had acquaintance with the wife of the plaintiff but he had no acquaintance with plaintiff and his mother-in-law. Second defendant had deserted the first defendant and her children and was residing in her parental house. The averment that he borrowed money for the construction of the house was denied. The building was constructed with his own funds and the construction of the building was over before January, 1989. He never demanded any financial help from the plaintiff for construction of the building. The averment that on three occasions he along with the second defendant borrowed money from the plaintiff was specifically denied. The first defendant sold 15 cents of land belonging to him and using the sale consideration the building was constructed. The wife of the plaintiff exerted undue influence on the second defendant to conduct unregistered chitties. He used to leave the house at 7.00

a.m. and return only after 6.00 p.m. During his absence the second defendant was conducting unregistered chitties along with the wife of the plaintiff. The wife of the plaintiff canvassed many subscribers and they, after bidding the chitties, committed default in remitting the subsequent instlaments. The second defendant was unable to pay other subscribers. The first defendant came to know all these facts only subsequently. When he questioned the second defendant, she quarreled with him. She deserted him, their children and left the matrimonial home. After the departure of the second defendant, the wife of the plaintiff came to his house and told that the second defendant borrowed Rs.24,500/- from her on two occasions in the year 1988. She further told him that if the amount was not returned, she will take legal action to get the amount. A settlement talk took place, brother of the second defendant intervened and for discharge of the entire amount due from the second defendant, the first had agreed to pay Rs.15,000/-. He issued two cheques for Rs.7,500/- each in pursuance of the settlement. The averment that he repaid the first loan

amount of Rs.15,000/- alone by way of two cheques was specifically denied. It was contended that he was not liable to repay any amount.

4. Second defendant filed a separate written statement. She also disputed receipt of any loan. It was contended that wife of the plaintiff was an Instructor in the Typewriting Institute run by her and at the instance of the wife of the plaintiff and her mother she started unregistered chitties. Plaintiff's wife and her mother canvassed various subscribers. Those subscribers, after bidding chitties and collecting the prize amounts, deliberately defaulted subsequent instalments. She found it difficult to pay other prized subscribers. Some amounts were due to the plaintiff's wife and at the threat of the plaintiff and his wife, she was forced to issue receipt. The averments that on three occasions plaintiff advanced loans to the first defendant and they agreed to repay that amount with 12% interest were denied. It was contended that first defendant was totally unaware of the transactions between the second defendant and the wife of the plaintiff. It was contended that during

July, 1990 second defendant gave two bangles to the plaintiff and requested him to pledge the ornaments and appropriate the amount. The averment that an amount of Rs.24,500/- was due from the defendants was denied.

5. Plaintiff gave evidence as P.W.1. Exhibits A1 to A8 were proved and marked. On the side of the defendants, D.Ws.1 to 3 were examined but no documentary evidence was adduced. Learned Sub Judge decreed the suit in part. A decree for Rs.32,700/- with 12% interest was passed against the second defendant alone. The suit as against the first defendant was dismissed. Second defendant had filed A.S. No.666 of 1994 challenging that part of the decree by which she was directed to pay the amount decreed. Challenging the dismissal of the suit against the first defendant plaintiff had filed A.S. No.758 of 1994. These appeals were heard together and are disposed of by this common judgment.

6. Specific case put forward by the plaintiff is that defendants borrowed Rs.15,000/- on 2.5.1989, Rs.10,000/- on 26.5.1989 and Rs.14,500/- on 21.6.1989 agreeing to repay with 12% interest. According to the plaintiff the amounts were

**received by the defendants for the purpose of construction of a building in the property of the second defendant situated at Kottarakkara. It is also his case that of the total amount of Rs.39,500/- defendants returned Rs.15,000/- by way of two cheques. The fact that two cheques for Rs.7,500/- were issued by the first respondent and those cheques were encashed was admitted by both sides. According to the first defendant he had not borrowed any amount at all. The wife of the plaintiff came to his house and threatened him and to avoid litigation he had agreed to pay Rs.15,000/- in discharge of the entire amounts due to her. The plaintiff had agreed to return the documents, if he pays Rs.15,000/-. Accordingly he paid Rs.15,000/- by way of two cheques for Rs.7,500/- each. The contention that those two cheques were issued in discharge of the entire debts was not established. The trial court which had occasion to watch the demeanour of the witnesses examined did not accept the contention that those two cheques were issued in discharge of the entire amounts claimed by the plaintiff. Exhibit A1 is the acknowledgment issued by the second defendant admitting receipt of**

Rs.10,000/- on 26.5.1989 and Rs.14,500/- on 21.6.1989. Plaintiff also could not establish that the amounts were advanced for the construction of the building. The evidence on record shows that second defendant was running a Typewriting Institute and D.W.3, wife of the plaintiff, was an Instructor in that Institute. The case put forward by the second defendant was that on account of the undue influence exerted by D.W.3 and her mother she started unregistered chitties. The subscribers canvassed by D.W.3 and her mother deliberately defaulted payment of subscriptions after bidding the chitties. So the second defendant was unable to pay the amount to other prized subscribers. Exhibit A2 series are the letters written by the second defendant to plaintiff, his wife and mother-in-law. Though the exact quantum of amount is not mentioned in Exhibit A2 series, it clearly establish that there were financial dealings between the second defendant, plaintiff, his wife and mother-in-law. In Exhibit A1 second defendant had admitted that she borrowed an amount of Rs.24,500/- on two occasions. In the written statement her case was that D.W.3 as well as her mother were subscribers to

the chitties and when second defendant found it difficult to pay amounts due to them in the chitty, she executed Exhibit A1. But subsequently she developed another case that for paying other successful bidders she borrowed Rs.7,500/- from the wife of the plaintiff agreeing to pay high rate of interest and Rs.24,500/- was arrived at by adding interest with that amount. Whatever may be the nature of the transactions between the second defendant, plaintiff, his wife and mother-in-law, there is material on record to show that second defendant owed money to them. Trial court has stated that because of the inconsistent stand taken by the second defendant no reliance can be placed on her oral evidence. In Exhibit A1 the second defendant had admitted that an amount of Rs.24,500/- was due to the plaintiff. The second defendant failed to prove that the amount stated in Exhibit A1 is not correct. The finding of the trial court that the evidence of D.W.2 is not reliable and acceptable is only to be confirmed. She had admitted the entries in Exhibit A1. Her evidence itself shows that she was heavily indebted and she had to sell the properties to wipe off debts. So the finding of the trial court

that second defendant received Rs.10,000/- on 26.5.1989 and Rs.14,500/- on 21.6.1989 is only to be confirmed.

7. Now I shall consider the case of the plaintiff that the trial court ought to have passed a decree against the first defendant. Exhibit A1 is the acknowledgment issued by the second defendant in her own handwriting. There is absolutely nothing on record to show that first defendant received any amount from the plaintiff or his wife. It is true that two cheques were issued by him for Rs.7,500/- each. According to him those cheques were issued for discharge of the amount claimed in the plaint. That contention was not established. It is also true that reply notices of both the defendants were drafted by the same lawyer and that lawyer initially filed a joint vakalath for defendants 1 and 2. According to the first defendant on getting the suit notice, he went to the house of the second defendant wherein she was residing and at that time the second defendant had promised to settle the matter and hence he handed over the notice received by him. A perusal of Exhibit A5 shows that the notice to the first defendant was sent to the Kollam address whereas the notice

to the second defendant was sent to Kottarakkara. Acknowledgment card also shows that notice addressed to the second defendant was received by her at Kottarakkara. In the plaint also it is specifically admitted that second respondent was residing at Kottarakkara at the time filing of the suit. The evidence on record clearly establishes that there were transactions between second defendant, plaintiff, his wife and her mother.

8. It is argued by the learned counsel for the plaintiff that he filed I.P. No.7 of 1992 against the defendants and they jointly contested that proceedings. In the suit also a joint vakalath was filed. But on a perusal of the vakalath shows that defendants 1 and 2 did not execute the same simultaneously. The vakalath still contain pencil marking which shows that the first defendant affixed his signature subsequently. Even accepting the case of the plaintiff that the defendants filed a joint vakalath that fact alone is not sufficient to hold that both of them are liable. As I have already sated, Exhibit A1 is written by the second defendant alone. Exhibit A2 series letters shows that it was written

without the knowledge and consent of the first defendant. In one of the letters it was stated that first defendant will be coming back to the house within 20 minutes. In Exhibit A2(b) it is written that at about 12 noon first defendant came back from the place of work for watching a programme in the Television. A reading of Exhibit A2 series clearly shows that first defendant had no knowledge of the financial dealings of the second defendant. Merely because he happened to be the husband of the second defendant he cannot be made liable for the plaint claim. The finding of the trial court that he cannot be made liable for the amount due from the second defendant is perfectly correct and does not call for any interference.

9. Court below awarded 12% interest from the date of suit. Though there is a an averment in the plaint and Exhibit A3 notice regarding payment of interest at the rate of 12%, there is nothing on record to show that there was any agreement between the plaintiff and second defendant to pay interest at 12%. Even according to the plaintiff the first loan of Rs.15,000/- was given to the defendants on 2.5.1989.

Rs.7,500/- was repaid on 1.3.1991 and RS.7,500/- on 1.6.1991. Admittedly no interest was paid for that amount. So the plaintiff is not entitled to get interest from the date of the alleged transaction. He can claim interest only from the date of the suit. He is entitled to get interest at the rate of 12% per annum during the pendency of the suit and at the rate of 6% from the date of decree.

10. In the result, A.S. No.666 of 1994 filed by the second defendant is allowed in part. The finding of the court below that the second defendant is liable to pay Rs.24,500/- is confirmed. But the plaint claim is modified and second defendant is liable to pay interest on Rs.24,500/- at the rate of 12% from the date of suit till date of decree and thereafter at the rate of 6%. A.S. No.758 of 1994 is dismissed.

No costs.

K. PADMANABHAN NAIR, JUDGE.

vsv

**K. PADMANABHAN NAIR, J.**

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**A.S. NO. 666 OF 1994**
**AND**
**A.S. NO. 758 OF 1994**

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**J U D G M E N T**

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**17TH AUGUST, 2007**